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IN THE

Supreme Court of the United States

October Term, 2000

Smurfit-Stone Container Corporation,

Petitioner,

v.

United States,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals for the Federal Circuit erred in concluding that Congress implicitly withdrew Tucker Act jurisdiction over Petitioner's action seeking a refund of unconstitutional harbor maintenance taxes?

RULE 29.6 LISTING

Smurfit-Stone Container Corporation is the successor to Stone Container Corporation, Stone Container International, and Savannah River Pulp and Paper. It has no parent company.

PARTIES TO THE PROCEEDINGS

The only parties currently before the Court are the United States and Smurfit-Stone Container Corporation.

Petitioner's case was designated a "test case" by the U.S. Court of International Trade ("CIT") on the issue raised in this petition. As a result, approximately 7,000 cases now pending before the CIT will be directly affected by the outcome of this case.

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PETITION FOR A WRIT OF CERTIORARI

Smurfit-Stone Container Corporation petitions for a writ of certiorari to review a judgment of the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") entered October 12, 2000.

OPINIONS BELOW

The opinion of the Federal Circuit (App. A, *infra*), is reported at 229 F.3d 1345. The opinion of the U.S. Court of International Trade ("CIT") (App.B, *infra*), is reported at 27 F. Supp. 2d 195.

JURISDICTION

The judgment of the Federal Circuit was filed on October 12, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 9, Clause 5 of the Constitution of the United States provides:

No Tax or Duty shall be laid on Articles exported from any State.

2. 28 U.S.C. § 1491(a)(1) provides, in relevant part:

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress....

3. 28 U.S.C. § 1491(c) provides, in relevant part:

Nothing herein shall be construed to give the United States Court of Federal Claims jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade ....

4. 28 U.S.C. § 1581(i) provides:

In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section ..., the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for –

(1) revenue from imports or tonnage;

(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(3) embargoes ...;

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

5. 28 U.S.C. § 1631 provides:

Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal ... is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

6. 28 U.S.C. § 2501 provides, in relevant part:

Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

7. 28 § U.S.C. § 2636(i) provides:

A civil action of which the Court of International Trade has jurisdiction under section 1581 of this title, other than an action specified in subsections (a)-(h) of this section, is barred unless commenced in accordance with the rules of the court within two years after the cause of action first accrues.

STATEMENT

In March 1998, the Court held that, when applied to exports, the harbor maintenance tax ("HMT") assessed in 26 U.S.C. §§ 4461-4462 violates the Export Clause of the Constitution. *United States v. United States Shoe*, 523 U.S. 360 (1998). This case presents important questions regarding Tucker Act jurisdiction (28 U.S.C. § 1491(a)(1)) and the appropriate Export Clause violation remedy available to the approximately 7,000 claimants in the HMT litigation. It will determine whether these exporters are entitled, under the ordinarily available Tucker Act remedy, to a return of approximately $500,000,000 that was unconstitutionally collected from them. *See* Brief of Petitioner for a Writ of

Certiorari, *Swisher Int'l v. United States*, 205 F.3d 1358 (Fed. Cir. 2000) at 6 ($500,000,00 not yet refunded to exporters). Therefore, this case also raises important fiscal considerations for both exporters and the United States. Finally, review by the Court is necessary to clarify the confusion over jurisdiction that persists in the HMT litigation.

The Tucker Act jurisdiction issue raised here was not actually presented by the parties to *United States Shoe*. That case involved only a claim for a refund of a *single* quarterly HMT payment (United States Shoe's second quarter 1994 payment). As a result, there was no issue presented regarding recovery of payments in earlier years. Here, in contrast, Petitioner seeks a refund of *dozens* of HMT payments which it made prior to 1994, so Tucker Act jurisdiction is at issue.

To be sure, the issue presented here lurked in the background of *United States Shoe* because any federal court always scrutinizes its grounds for jurisdiction. However, it was not briefed or argued before this Court. United States Shoe did not brief this issue because it filed its refund lawsuits within two years of making its payment and asserted jurisdiction pursuant to 28 U.S.C. § 1581(i) *and* 28 U.S.C. § 1581(a). For this reason, the Court discussed only those clauses with respect to its jurisdiction.

Similarly, the government's petition for a writ of certiorari in *United States Shoe* also made clear that it did not seek review of the Federal Circuit's jurisdictional holding. Brief of Petitioner for a Writ of Certiorari, *United States v. United States Shoe*, 523 U.S. 360 (1998) at 7, n.2. Accordingly, neither party briefed the issue. Only a single *amicus curiae* brief filed in *United States Shoe* mentioned the issue. *See* Amicus Curiae Brief of Arctic Cat, *United States v. United States Shoe*, 523 U.S. 360 (1998).

Oral argument further confirmed that the *United States Shoe* case did not cover the issue raised here. When Justice Ginsberg queried counsel for United States Shoe, on the Tucker Act issue, he declined to comment because the issue

"did not affect" his client. Trans. Oral. Arg. *United States v. United States Shoe*, 523 U.S. 360 (1998). Likewise, counsel for the United States did not argue the Tucker Act issue. As a result, this Court's opinion addressed jurisdiction only in the context of the issues presented, and did not address whether Congress' grant of jurisdiction to the CIT ousted the Court of Federal Claims ("CFC") of its ordinarily available Tucker Act jurisdiction.

With respect to the persisting confusion regarding jurisdiction in lower courts, while the *United States Shoe* case was being litigated some exporters filed refund lawsuits in the CFC and some filed in the CIT.[1] Petitioner filed its refund lawsuit in the CIT under 28 U.S.C §1581(i).

After the Court decided *United States Shoe*, the CFC ruled that it lacked jurisdiction. *See Halliburton Co. v. United States*, 41 Fed. Cl. 272 (1998); *AGP, LP v. United States*, 41 Fed. Cl. 607 (1998). The CIT, in turn, affirmed that it had jurisdiction over the HMT litigation and ordered Customs to refund to Petitioner only HMT payments made within two years prior to the filing of Petitioner's refund lawsuit (based on the two year statute of limitations contained in the CIT's jurisdictional statute, 28 U.S.C. § 2636(i)).[2]

Petitioner argued in the CIT that Tucker Act jurisdiction (28 U.S.C. § 1491(a)(1)) existed under established Supreme Court precedent not addressed by this Court in *United States Shoe* and requested the CIT to transfer part of its case to the CFC. Petitioner also asserted it was entitled to refunds of *all* the unconstitutional taxes it had paid. Alternatively, if a statute of limitations applied to Petitioner's action, Petitioner

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[1] In fact, to the best of Petitioner's knowledge, the first case filed to challenge the HMT was filed in federal district court, rather than the CIT or the CFC. *See American Ass'n of Exporters and Importers v. United States*, Civ. No. L 94-1839 (1994 D.Md).

[2] To the best of Petitioner's knowledge, Customs has completed this refund process for all exporters who filed refund lawsuits in the CIT under Section 1581(i) and issued refunds totalling approximately $700,000,000.

maintained that Customs owed additional refunds due to the "*American Pipe*" tolling created by the filing of a class action in *Baxter Healthcare v. United States*, 925 F. Supp. 794 (Ct. Int'l Trade 1996).[3] *See also*, *Swisher Int'l v. United States*, 205 F. 3d 1358 (Fed. Cir. 2000) (notwithstanding this Court's decision in *United States Shoe*, CIT had exclusive jurisdiction over HMT refund action under Section 1581(a)); *Hohenberg Bros. v. United States*, No. 96-09-02074, slip op. 00-172 (Ct. Int'l Trade Dec. 28, 2000) (whether certain refund judgments should be modified to reflect Section 1581(a) jurisdiction rather than Section 1581(i) jurisdiction in light of the Federal Circuit's decision in *Swisher Int'l v. United States*).

Against this background, the CIT selected Petitioner's case as a test case on the statutes of limitation issues raised by Petitioner. *United States Shoe v. United States*, No. 94-11-00668, slip op. 98-67 (Ct. Int'l Trade May 20, 1998). Further proceedings in all export-related cases other than *Swisher, supra,* and *IBM v. United States*, 201 F.3d 1367 (Fed. Cir. 2000), which involved whether Section 1581(i) claimants were entitled to interest on their HMT refunds, were stayed again.

On October 5, 1998, the CIT ruled on Petitioner's claims. It ruled that a statute of limitations (28 U.S.C. § 2636 (i)) applied to HMT refund actions and that the *Baxter Healthcare* class action tolled the statute of limitations. (App. B, *infra*, B-4). However, citing footnote 3 of the Court's decision in *United States Shoe*, the CIT declined to adopt the broader Tucker Act limitation period (28 U.S.C. § 2501) or to transfer part of Petitioner's claims to the CFC. (App. B, *infra*, B-6). It reasoned that the "exclusive" nature of its Section 1581 jurisdiction defeated Petitioner's Tucker Act claim. (App. B, *infra*, B-7).

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[3] The Baxter Healthcare class action was filed in October 1994. The CIT did not rule on class certification until May 1996, when it declined to certify a class.

On October 12, 2000, the Federal Circuit affirmed the CIT decision.[4] In ruling that Tucker Act jurisdiction did not exist, the Federal Circuit reasoned that jurisdiction was always in the CIT, with the only dispute being whether jurisdiction was under Section 1581(a) or Section 1581(i). (App. A, *infra*, A-9). According to the Federal Circuit, neither this Court nor the Federal Circuit ever suggested otherwise. (App. A, *infra*, A-9).

Shortly thereafter, on December 4, 2000, the Court declined to issue a writ or certiorari in *Swisher*, even though the Federal Circuit's decision in *Swisher* appeared to contradict this Court's previous statement in *United States Shoe* that exclusive CIT jurisdiction over an HMT refund lawsuit was found under Section 1581(i)(4).[5] Further jurisdictional wrangling ensued as some exporters sought to have their Section 1581(i) judgments modified to cite Section 1581(a) jurisdiction.[6] *See, Hohenberg Bros, supra.*

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[4] Petitioner does not ask this Court to review the Federal Circuit's decision that a statute of limitations applied to Petitioner's case or the Federal Circuit's decision with respect to tolling. Petitioner only seeks certiorari on the issue of whether Congress explicitly withdrew its Tucker Act remedy when it enacted the HMT or created the CIT.

[5] The denial of certiorari in *Swisher* creates inconsistent remedies for exporters. Some exporters (*i.e.*, those that filed *Swisher* type claims for payments not yet covered by a refund judgment) may receive full refunds. Other exporters (*i.e.*, exporters that only filed Section 1581(i) cases) may not. Similarly, some exporters may receive interest on their refunds. Others may not. For this reason, the *Swisher* decision did not moot Petitioner's case. *See* App. A, *infra*, A-4). Nonetheless, Petitioner disagrees with the Federal Circuit's *dictum* in footnote 1 of it's opinion.

Currently, the Court is reviewing whether to issue a writ of certiorari in *IBM v. United States*, No. 00-482. The Court's decision on IBM's petition does not impact the analysis here, but Petitioner notes that a denial of certiorari in IBM may create inconsistent remedies for exporters

[6] Section 1581(a) jurisdiction entitles these exporters to post-summons interest pursuant to 28 U.S.C. § 2644.

REASONS FOR GRANTING THE WRIT

1. The Federal Circuit's Decision in This Case Erodes the Court's Established Tucker Act Jurisprudence and Conflicts with Another Recent Federal Circuit Decision.

The Court has consistently held that jurisdictional statutes are not strictly construed if doing so would divest the CFC of its Tucker Act jurisdiction. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-25 (1974). It also has instructed that a Tucker Act remedy exists unless Congress clearly says otherwise. *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 13 (1990).

In the *Regional Rail Reorganization Act Cases*, for example, the Court determined that the Court of Claims (predecessor to the CFC) had jurisdiction over takings claims arising out of the Regional Rail Reorganization Act of 1973, ("Rail Act"), despite a provision in the Rail Act granting jurisdiction to a special three-judge court referred to as the "Special Court." 419 U.S. at 126-27. The Court said that a major issue before it was: "whether an action at law in the Court of Claims under the Tucker Act . . . will be available to recover any ***deficiency of constitutional dimension*** provided under the Rail Act." 419 U.S. at 121 (emphasis added). It concluded that "applicable canons of statutory construction require us to conclude that the Rail Act is not to be read to withdraw the remedy under the Tucker Act" and so preserved a constitutional claim for Court of Claims jurisdiction. *Id.* at 133.

In *Ruckelshaus v. Monsanto Co.*, the Court affirmed that "where two statutes are `capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" 467 U.S. 986, 1018 (1984) (*quoting Regional Railroad Reorganization Act Cases*, 419 U.S. at 133-34.) It again held that it is inappropriate for federal courts to infer that Congress has withdrawn Tucker Act jurisdiction.

The Court in *Preseault* emphasized that a Tucker Act remedy exists "unless there are unambiguous indications to the contrary." 494 U.S. at 12. In *Preseault*, neither the National Rail System Act Amendments of 1983, Pub. L. 98-11, 97 Stat. 48, nor its legislative history, mentioned the Tucker Act. Accordingly, the Court ruled that Congress did not demonstrate an "unambiguous intention to withdraw [a] Tucker Act remedy." 494 U.S. at 12 (internal quotations omitted).

In the instant case, neither of the lower courts addressed the Court's Tucker Act precedent but instead, focusing on use of the word "exclusive" in Section 1581, inferred that Congress withdrew Tucker Act jurisdiction for Petitioner's claims. The conclusion that Tucker Act jurisdiction was withdrawn by implication represents a significant erosion of the Court's Tucker Act precedents and warrants the granting of a writ of certiorari.

Congress has not clearly withdrawn Tucker Act jurisdiction with respect to HMT refund claims. There is nothing in the language of the law creating the HMT (the Water Resources Development Act of 1986) ("WRD Act"), Pub. L. No. 99-662, 100 Stat. 4208, or the CIT (the Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727) that explicitly withdraws Tucker Act jurisdiction. Although the statute creating the CIT grants the CIT "exclusive" jurisdiction over certain types of actions, Petitioner believes that this Court's Tucker Act precedent counsels against finding a withdrawal of Tucker Act jurisdiction by implication and, rather, allows for interpreting the CIT's jurisdiction under Section 1581 in a manner that preserves Petitioner's Tucker Act claim.

Interpreting the word "exclusive" narrowly is not without precedent. Confronted with a jurisdictional quagmire in *California v. Arizona*, 440 U.S. 59 (1979), the Court held that "exclusive" did not mean exclusive in a quiet title action between states that also involved the federal government. The Court in *California* was faced with the inconsistency between

a federal statute giving district courts "exclusive" jurisdiction over quite title actions involving the federal government and the Court's original jurisdiction over suits between states. The Court held that the statute granting district courts "exclusive" jurisdiction over quiet title actions involving property in which the United States has an interest did not oust the Court of its original jurisdiction over suits between states and the United States because Congress used the word "exclusive" only to preclude state courts from exercising jurisdiction. 440 U.S. at 67-68. Thus, the word "exclusive" actually did not mean "exclusive" when it would produce an anomalous result.

The scant legislative history to the WRD Act's jurisdiction section supports Petitioner's contention that Congress did not intend the CIT to have sole jurisdiction over actions arising out of the WRD Act. Congress stated instead that the CIT will be the court of "primary" jurisdiction for such actions. *See Report of the Senate Finance Committee*, S. Rep. No. 99-228, 10 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6705, 6715. If Congress intended the CIT to have exclusive jurisdiction related to the WRD Act, it easily could have so stated. Congress' failure to do so suggests that there is concurrent CFC Tucker Act jurisdiction over Petitioner's claims.

The plain language of the legislative history of the Customs Courts Act of 1980 also supports Petitioner's claim that there was no evidence of Congressional intent to withdraw Tucker Act jurisdiction. In enacting the Customs Courts Act of 1980, Congress sought to create "a comprehensive system of judicial review of civil actions arising from import transactions" to "ensure greater efficiency in judicial resources and uniformity in the judicial decision making process." *Report of the House Judiciary Committee*, H.R. Rep. No. 96-1235, 20 (1980), *reprinted* in 1980 U.S.C.C.A.N. 3729, 3731. The Report stated Section 1581(i) was the product of Congress' "generic approach" to jurisdiction "in an effort to provide greater protection for the

rights of persons involved in disputes arising out of *import* transactions." *Id.* at 3745 (emphasis added). Thus, the emphasis in the legislative history is on actions relating to *import* activity and consolidation in the CIT of jurisdiction previously divided between the Customs Court and the district courts. The Tucker Act and CFC are not mentioned, directly or indirectly, in either the plain language of the statute or its legislative history with respect to *export* transactions.

Finally, the Federal Circuit's decision here conflicts with a recent decision of that court involving the Export Clause and the Tucker Act. In *Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369 (Fed. Cir. 2000), the Federal Circuit ruled a Tucker Act remedy exists in the CFC for Export Clause violations. The Federal Circuit based its opinion on the fact that the Export Clause provides a self-executing remedy: return of the unconstitutionally taken money. According to the Federal Circuit, such a remedy could be pursued in the CFC pursuant to the Tucker Act.

Here, by contrast, the Federal Circuit denied Petitioner the same remedy it granted to Cyprus Amax Coal. Although different taxes are at issue here than in *Cyprus Amax Coal*, the Tucker Act is not based upon any specific type of tax. Rather, the question is whether a constitutional violation occurred and whether it caused monetary damage to a plaintiff. Here, a constitutional violation caused monetary damage to Petitioner.

For these reasons, the decision of the Federal Circuit signifies a major departure from this Court's Tucker Act precedents, and conflicts with the Federal Circuit's decision in *Cyprus Amax Coal*. Because 28 U.S.C. § 1631 allows for transfer of Petitioner's claims to the CFC if in the interests of justice, and providing a remedy for a constitutional violation

is in the interest of justice, the Federal Circuit should have ordered the CIT to transfer Petitioner's claims to the CFC.[7]

2. The Court Should Address the Issue of Tucker Act Jurisdiction Over an HMT Refund Lawuist in An Actual Case or Controversy, Rather Than As *Obiter Dictum*.

In footnote 3 of the *United States Shoe* decision, *supra*, the Court stated:

> Because we determine that the Court of International Trade has exclusive jurisdiction over challenges to the HMT under § 1581(i)(4), it follows that the Court of Federal Claims lacks jurisdiction over the challenges to the HMT currently pending there. *See* 28 U.S.C. § 1491(b). The plaintiffs in these challenges may invoke § 1631, which authorizes inter-court transfers, when "in the interest of justice," to cure want of jurisdiction.

Both courts below relied on this language to deny Petitioner a Tucker Act remedy for the constitutional violation that occurred. Petitioner respectfully submits that the Court reached this conclusion without the benefit of full briefing and oral argument. Accordingly, another compelling reason for granting Petitioner's request for a writ of certiorari is that it will allow the Tucker Act issue to be fully briefed and argued in an actual case or controversy.

The Court has previously instructed that jurisdictional statements made in *dictum* are not necessarily binding. In *McDaniel v. Sanchez*, 452 U.S. 130 (1981), the Court said that *dictum* responding to an *amicus curiae* brief is not binding. In that case, the petitioners relied on a footnote

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[7] The Tucker Act provides that "[n]othing herein shall be construed to give the [CFC] jurisdiction of any civil action within the exclusive jurisdiction of the [CIT] . . . ." 28 U.S.C. § 1491(c). The statute, however, begs the question of whether Petitioner's claim is within the exclusive jurisdiction of the CIT.

addressing an unlitigated issue in a previous Supreme Court opinion. The Court held that the footnote was not binding because it was a response to a contention made by the United States as *amicus curiae*, and was "*dictum* unnecessary to the decision in that case. It is, therefore, not controlling in this case, in which . . . [the question] is directly placed in issue." *Id.* at 141.

The facts of *McDaniel* are analogous to those presented in *United States Shoe*. An *amicus curiae* raised the issue of jurisdiction which was unrelated to the issues litigated in the case. Footnote 3 of the Court's opinion in *United States Shoe* was unnecessary because, as noted above, United States Shoe's suit was filed within two years of the HMT payment at issue. Thus, the issue of Tucker Act jurisdiction over claims outside 28 U.S.C. § 2636(i) was neither before the Court nor briefed by the parties, and the Court's comments were *obiter dictum*.

Nor can it be said that footnote 3 is controlling here because it concerns jurisdiction. In *Ankenbrandt v. Richards*, 504 U.S. 689 (1992), for example, the Court considered a rule stated in *Barber v. Barber*, 62 U.S. (21 How.) 582 (1859), that federal courts do not have jurisdiction over domestic relations cases. However, the "rule" set forth in *Barber* was merely *dictum*, and not part of the holding. 62 U.S. at 584. In *Ankenbrandt*, the Court recognized that the basis for the jurisdictional limitation had never been addressed, and that no authority existed for it. As such, the Court was "compelled" to consider and explain the jurisdictional question. 504 U.S. at 695. Despite the long accepted understanding based on *dictum* from *Barber* that federal courts would not exercise jurisdiction over domestic relations cases, the Court did not consider the *dictum* to be sufficiently authoritative to establish a precedent.

Finally, although denial of a certiorari petition is not precedent itself, Petitioner believes the Court's denial of certiorari in *United States v. Swisher Int'l* may be evidence that the Court did not intend footnote 3 to be binding.

Granting the instant writ of certiorari would allow the Court to clarify the remedy available to exporters for the Export *Clause violation.*

CONCLUSION

The petition for a writ of certiorari should be granted. Respectfully submitted.

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January 2001

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

99-1333,-1334

STONE CONTAINER CORPORATION, STONE CONTAINER INTERNATIONAL and STONE CONTAINER SAVANNAH RIVER PULP & PAPER,

Plaintiffs-Cross Appellants,

v.

UNITED STATES,

Defendant-Appellant.

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Appealed from: United States Court of International Trade

Judge Jane A. Restani

United States Court of Appeals for the Federal Circuit

99-1333, -1334

STONE CONTAINER CORPORATION, STONE CONTAINER INTERNATIONAL and STONE CONTAINER SAVANNAH RIVER PULP & PAPER,

Plaintiffs-Cross Appellants,

v.

UNITED STATES,

Defendant-Appellant.

DECIDED, October 12, 2000

Before, BRYSON, LINN, and DYK *Circuit Judges*

DYK, *Circuit Judge*.

DECISION

In *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998), the Supreme Court held that the Harbor Maintenance Tax ("HMT"), 26 U.S.C. § 4461 (a), violated the Export Clause of the Constitution. Exporters have filed thousands of refund claims seeking recovery of HMT payments. Many of these refund suits were filed some years after the taxes were paid. This case was designated as a test case by the Court of International Trade to determine the applicable limitations period for these suits. We hold that the two-year statute of limitations of 28 U.S.C. § 2636(i) governs such suits; that the limitations period was tolled by the filing of the class action in *Baxter Healthcare Corp. v. United States*, 925 F. Supp. 794 (Ct. Int'l Trade 1996); but that the tolling period expired when the class action was dismissed by the district court in *Baxter*. Accordingly, we *affirm*.

I.

The facts are undisputed. Stone Container Corporation, Stone Container International, and Stone Container Savannah River Pulp & Paper (collectively, "Stone") made regular HMT payments from 1987 through 1998, and the United States and Stone have stipulated to the amount, quarter, and date for each payment made. In *United States Shoe*, the Supreme Court held that the Court of International Trade has exclusive jurisdiction over suits for refund under 28 U.S.C. § 1581(i).[1] *See United States Shoe*, 118 S. Ct. at 1294 n.3. On October 15, 1996, Stone filed suit in the Court of International Trade under 28 U.S.C. § 1581(i) seeking recovery of all of its HMT payments.

The limitations period for suits brought under § 1581(i) is specified by 28 U.S. § 2636(i):

> A civil action of which the Court of International Trade has jurisdiction under section 1581 of this title, other than an action specified in subsections (a) - (h) of this Section, is barred unless commenced

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[1] *In Swisher Int'l Inc. v. United States*, 205 F.3d 1358 (Fed. Cir. 2000), this court held that an exporter seeking a refund could alternatively file a claim for refund with the Customs Service, protest Customs' refusal to grant a refund, and, upon denial of the protest, sue in the Court of International Trade under § 1581 (a). *Swisher* held that neither the statute nor the regulations imposed any time limit on the refund request, although the regulations imposed a 180-day time limit on the Court of International Trade suit after the denial of the protest. *See id.* at 1369. Although Stone has not sought to utilize the refund/protest approach upheld in *Swisher*, Stone contends that the *Swisher* alternative still remains open to exporters who can marshal the necessary paperwork to file a refund claim with the Customs Service, even if the exporter has filed a § 1581 (i) claim which is barred in whole or in part by the statute of limitations. Stone's argument raises serious questions, including whether the doctrines of laches, waiver, or election of remedies would bar such an effort. Those questions are not presented by this case, and Stone concedes that at least some of the HMT claimants do not have the paperwork necessary to file a refund claim.

> in accordance with the rules of the court within two years after the cause of action first accrues.

The parties agreed that the statute of limitations, if applicable, ran from the date of payment of the tax, but they disputed whether the statute of limitations had been tolled by the filing of a class action in *Baxter*. If not tolled. a two-year limitations period would bar recovery of a substantial portion of the payments made by Stone.

Baxter was filed on October 27, 1994, and sought certification of a class which would have composed all persons who had paid the HMT in connection with the export of commercial cargo. On May 7, 1996, the Court of International Trade ruled that because of the particular posture of cases seeking HMT refunds, a class action did not provide a superior mechanism for resolution of those disputes, and the Court of International Trade therefore denied class certification. *See Baxter Healthcare Corp.*, 925 F. Supp. at 800. While Stone was not a named party in Baxter, it was a member of the putative class. Stone argued that the filing of the *Baxter* class action tolled the statute of limitations from the date of the filing through the present and that the tolling would continue until the class action issue was no longer appealable. At oral argument, counsel for Stone (who is also counsel for the taxpayers in *Baxter*) represented that a portion of *Baxter* remained pending and that, after a final judgment In the trial court, taxpayers could still file an appeal seeking review of the 1996 denial of class certification by the *Baxter* trial court.

The Court of International Trade held that the two-year limitations period applied and that the filing of *Baxter* tolled the statute of limitations for Stone. The Court of International Trade relied upon *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), for the proposition that filing a class action under Rule 23 of the Court of International Trade stops the statute of limitations from running for all claims covered by the representative action. Relying on *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990), the Court of

Intentional Trade also hold that such tolling applied in suits against the United States under § 2636. However, citing the reasoning of *Armstrong v. Martin Marietta Corp.*, 138 F-3d 1374 (11th Cir. 1998) (en banc), the Court of International Trade held that tolling ended when the district court in Baxter denied class certification. The Court of International Trade rejected Stone's additional contentions, such as Stone's argument that the government cannot create statutes of limitations for claims based on unconstitutional taxes. The United States appealed, and Stone cross-appealed.

II.

The issues raised in these appeals are all questions of law, which we review de novo. *See Medline Indus., Inc. v. United States*, 62 F.3d 1407,1409 (Fed. Cir. 1995).

At the outset, relying on Justice Scalia's concurring opinion in *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 760 (1995). Stone argues that it is unconstitutional to apply any statute of limitations to refund claims with respect to an unconstitutional tax. Stone does not explain why unconstitutional taxes, unlike other constitutional violations, should be free of statutes of limitations. In any event, Stone's argument is directly foreclosed by the Supreme Court's decision in *McKesson Corp. v. Division Alcoholic Beverages and Tobacco*, 496 U.S 18 (1990). In *McKesson*, the Florida Supreme Court struck down a tax that unconstitutionally discriminated against interstate commerce, but it refused to provide taxpayers with a refund. The United States Supreme Court reversed, holding that when a state requires payment of a tax and relegates challenges to the tax to postpayment refund actions, 'the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief.' *McKesson*, 496 U.S. at 31. Although *McKesson* is based on the Due Process Clause of the Fourteenth Amendment, its principles are equally

applicable to the federal government through the Due Process Clause of the Fifth Amendment.[2]

However, the Supreme Court in McKesson also stated explicitly that a state was free to impose various procedural requirements on actions for post deprivation relief, including "enforc[ing] relatively short statutes of limitations applicable to such actions." *See id.* at 45. Thus, the Supreme Court has rejected Stone's argument that it is unconstitutional to apply a statute of limitations to an unconstitutional tax.

Stone invites this court to disregard the Supreme Court's statements that it is permissible to enforce a statute of limitations in suits to recover payment of unconstitutional taxes. According to Stone, those statements are mere dicta, and we are free to disregard them. We are required to decline Stone's invitation. As a subordinate federal court, we do not share the Supreme Court's latitude in disregarding the language in its own prior opinions. As the Supreme Court cautioned in *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312 (1994). "once the [Supreme] Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law."[3] The Supreme Court can accept for review only a limited number of cases, and it must give

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[2] In the federal context, as in the state context, a taxpayer is generally barred from injunctive relief, thus giving rise to the obligation to provide meaningful backward-looking relief. *See Enochs v. Willams Packing & Nav. Co.*, 370 U.S. 1 (1962); 26 U.S.C. § 7421(a). Since we reject Stone's due process argument for the reasons stated in text, we need not decide whether the possibility of injunctive relief with respect to the HMT should alter the governing due process requirements.

[3] While in *Evans Cooling Sys., Inc. v. General Motors Corp.*, 125 F.3d 1448 (Fed. Cir. 1997), this court characterized certain statements in three early Supreme Court cases as "dicta," in fact the statements in those Supreme Court cases did not contradict the holding of *Evans Cooling* that the on-sale bar is not subject to an exception for sales made by a third party which misappropriates the patented invention. *See id.* at 1452-54.

guidance to the lower federal and state courts in broad language. Here, the Court's statements are both explicit and carefully considered, and we must follow them.[4]

Moreover, the right to a refund of unconstitutional taxes collected under compulsion is, in effect, a claim for deprivation of property without due process. *See McKesson*, 496 U.S. at 36. Both the Supreme Court and this court have repeatedly held that the federal government may apply statutes of limitations to just compensation claims, *See, e.g., Block v. North Dakota*, 461 U.S. 273, 292 (1983); *Bioling v. United States*, 220 F.3d 1365, 1375 (Fed. Cir. 2000). As the Supreme Court ruled in *Block*, a "constitutional claim can become time barred just as any other claim can." *Block*, 461 U.S. at 292; *see also United States v. Dalm* 494 U.S. 596, 602 (1990) (holding that a statute of limitations barred an untimely claim for a federal income tax refund, regardless of whether the tax is alleged to have been 'erroneously,' 'illegally,' or wrongfully collected"' (citations omitted)).

III.

Stone also argues that a tax refund remedy must be "clear and certain" and that the remedy here under § 1581(1) was not "clear and certain" before the Supreme Courts decision in *United States Shoe*. Stone urges that in view of the confusion surrounding the remedy, taxpayers at a minimum should have the benefit of the Tucker Act's six-year limitations period. *See* 28 U.S.C. § 1491, 28 U.S.C. § 2501. While we agree with Stone that there was confusion surrounding the proper remedy before *United States Shoe*, we do not agree that this confusion requires us to afford taxpayers the benefit of the longer limitations period.

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[4] Other circuits have followed this approach. *See. e.g., Natural Res. Def. Council, Inc. v. Nuclear Regulatory Comm'n*, 216 F.3d 1180,. 1189 (D.C. Cir. 2000); *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996).

The HMT provides that "[f]or purposes of determining the jurisdiction of any court of the United States or any agency of the United States, the tax imposed by this subchapter shall be treated as if such tax were a customs duty." 26 U.S.C. § 4462(9(2) (1994). Before *United States Shoe*, there was considerable confusion over whether this provision gave rise to jurisdiction under 28 U.S.C. § 1581 (a) or 28 U.S.C. § 1581 (i). In either case, however, jurisdiction lay only in the Court of International Trade. Section 1581 (a) provides the Court of International Trade with jurisdiction over suits contesting the denial of a Customs protest, while § 1581(i) provides for jurisdiction over suits arising out of "administration and enforcement with respect to the matters referred to in [the preceeding paragraphs]," which include any laws providing revenue from imports. In *United States Shoe*, the government argued that jurisdiction was proper under §1581(a), and that recovery was limited to amounts protested within ninety days of payment. *See United States Shoe Corp. v. United States*, 114 F-3d 1564, 1568 (Fed. Cir. 1997), aff'd. 523 U.S. 360 (1998). The Supreme Court however, held that exclusive jurisdiction existed under § 1581(i). *United States Shoe*, 523 U.S. at 366-66. In *Swisher*, this court subsequently held that an exporter seeking a refund could alternatively file a claim for refund, protest Customs' refusal to grant a refund and, upon denial of the protest, sue in the Court of International Trade under § 1581(a). *See Swisher Int'l Inc. v. United States*, 205 F.3d 1358, 1369 (Fed. Cir. 2000). Although jurisdictional confusion thus existed, it is significant that neither the Supreme Court nor this Court ever suggested that a suit for recovery of the HMT could be maintained under the Tucker Act with its six-year statute of limitations.

Armed with this confusion over the remedy available for challenges to the HMT, Stone cites *Reich v. Collins*, 513 U.S. 106, 108 (1994), for the proposition that "due process requires a 'clear and certain' remedy for taxes collected in violation of federal law." *Reich*, however, is best characterized as a "bait-and-switch" case. The Supreme Court in *Reich* stated that Georgia was not allowed to "hold out what plainly

appears to be a 'clear and certain' postdeprivation remedy and then declare, only after the disputed taxes have been paid, that no such remedy exists." *Id. Reich* stands, at most, for the proposition that a state (or the federal government) may not restrict access to postpayment relief when a taxpayer reasonably relies on the availability of such relief. *See Newsweek, Inc. v. Florida of Revenue*, 522 U.S. 442, 445 (1998) (per curiam) (requiring remedy for taxpayer who reasonably relied on the apparent availability of a postpayment refund"). Here, Stone was not confronted with the "bait and switch" situation that the Supreme Court addressed in *Reich*, and it does not claim otherwise. As we have noted, no previous decision of this or any other court held that Tucker Act jurisdiction was available to challenges to the HMT.

We note that the requirement of a "clear and certain" remedy appears to have originated with the opinion by Justice Holmes in *Atchison Topeka & Santa Fe Railway Co. v. O'Connor*, 223 U.S. 280, 285 (1912) and to have been recently reiterated as a constitutional requirement in *Reich v. Collins*. But we are aware of no case, and none has been called to our attention, holding that mere existence of uncertainty in the remedy amounts to a constitutional violation. Indeed, Justice Brandeis, speaking for a unanimous Court, specifically instructed us that it does not in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930). That case was essentially the same as *Reich* (and was cited in *Reich*, 513 U.S. at 113), and the Court reached the same result - it held that a state court denied due process when it overruled a prior decision that would have allowed a particular remedy, substituted a new remedy, and held that the new remedy was barred. In so holding the Court addressed our very problem, stating in a footnote: "Had there been no previous construction of the statute by the highest court, the plaintiff would, of course, have had to assume the risk that the ultimate interpretation by the highest court might differ from its own." *Id.* at 682 n.g. That is exactly the case here. Before *United States Shoe*, there was no ruling by the Supreme Court

regarding the jurisdiction over challenges to the HMT, and Stone bore the risk that reliance on the Tucker Act might prove misplaced.

Again, both the Supreme Court and this court have assumed that the existence of questions as to the applicability of a statute of limitations or its tolling do not prevent courts from applying the statute (as construed) to claims for just compensation. *See, e.g.*, *Block v. North Dakota*, 461 U.S. 273, 292 (1983); *Boling v. United States*, 220 F.3d 1365, 1375 (Fed. Cir. 2000). The same principle necessarily applies to claims for the refund of unconstitutional taxes.

To be sure, even if government action does not rise to the level of a due process violation, governmental misconduct may sometimes result in equitable tolling uf the statute of limitations. *See Irwin*, 498 U.S. at 96; *Watkins v. United States Army*, 875 F.2d 699, 706-09 (9th Cir. 1989). We need not decide whether such equitable tolling could occur against the government, for Stone has not shown any misconduct by the government which misled it as to the applicable limitations period.[5]

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[5] We also reject Stone's suggestion that we disregard as dicta the Supreme Court's statements in *United States Shoe* that "the Court of International Trade has exclusive jurisdiction over challenges to the HMT under § 1581 (i)(4)" and that "the Court of Federal Claims lacks jurisdiction over the challenges to the HMT currently pending there." *United States Shoe*, 118 S. Ct. at 1293 n.3.

Since the Court of International Trade's jurisdiction is "exclusive," there is no jurisdiction under the Tucker Act. *See* 28 U.S.C. § 1491. Stone's suggestion that this court order a transfer to the Court of Federal Claims is thus meritless because that court lacks jurisdiction. Stone's other contentions, including its suggestion that we dispense with the doctrine of sovereign immunity (a position inconsistent with our analysis of whether taxpayers may be awarded interest on refunds of the HMT in *International Bus. Machines Corp. v. United States*, 210 F.3d 1367, 1374-75 (Fed. Cir. 2000)), are frivolous and do not merit separate discussion.

IV.

We turn next to Stone's more substantial argument - that the filing of the class action in *Baxter* tolled the statute of limitations during the pendency of that suit. The United States urges that *Baxter* did not toll the statute. We agree with Stone.

A statute of limitations is a condition on the waiver of sovereign immunity by the United States. *See. e.g., Block v. North Dakota*, 461 U.S. 273, 287 (1983). Although courts "should not construe such a time-bar provision unduly restrictively, [they] must be careful not to interpret it in a manner that would 'extend the waiver beyond that which Congress intended.'" *Id.* (quoting *United States v. Kubrick*. 444 U.S. 111, 117-18 (1979)).

The question here is whether the limitations period was tolled. The Supreme Court's decisions do not speak with great clarity on the subject of equitable tolling against the government. *In Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89 (1990), the Supreme Court addressed whether equitable tolling could apply to a claim against the government under Title VII. The relevant statute required the employee to file a civil action "[w]ithin thirty days of receipt of notice of final action taken by ... the Equal Employment Opportunity Commission." 42 U.S.C. § 2000e-16(c) (1990). The petitioner had failed to meet this deadline because his lawyer was absent from his office when the Equal Employment Opportunity Commission notice was received. The Supreme Court adopted "a more general rule to govern the applicability of equitable tolling in suits against the Government." *Irwin*, 498 U.S. at 95. The Court held that once Congress had made a waiver of sovereign immunity, the "same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Id.* at 95-96. The Court explained that this now rule was "a realistic assessment of legislative intent." *Id.* at 95. The Court nevertheless rejected the petitioners request that equitable tolling should be applied to his failure to file in

a timely manner, noting that "the principles of equitable tolling ... do not extend to what is at best a garden variety claim of excusable neglect." *Id.* at 96. The Court also explicitly overruled *Soriano v. United States*, 352 U.S. 270 (1957). *See Irwin*, 498 U.S. at 94-95. In *Soriano*, the petitioner, a resident of the Philippines, argued that the statute of limitations for his takings case should be equitably tolled based on wartime hostilities in the Philippines. The Court had rejected the possibility of equitable tolling against the government: "Congress was entitled to assume that the limitation period it prescribed meant just that period and no more. " *Soriano*, 352 U.S. at 276.

In *United States v. Brockamp*, 519 U.S. 347 (1997). however, the Supreme Court appeared to retreat somewhat from the general rule announced in *Irwin*. *Brockamp* involved claims for tax refunds governed by the two-year limitations period of § 6511 of the Internal Revenue Code. The taxpayers urged that the two-year limitation period be tolled on the basis of disability (senility in one case, alcoholism in another). The Court first suggested that tolling might not apply to claims against the government, which were not similar to claims against private parties. However, the Court was "willing to assume, favorably to the taxpayers but only for argument's sake, that a tax refund suit and a private party suit for resolution are sufficiently similar to warrant asking *Irwin's* negatively phrased question. "Is there good reason to believe that Congress did not want the equitable tolling doctrine to apply?" *Brockamp*, 519 U.S. at 350. The Court went on to reject equitable tolling because the relevant limitations statute manifested congressional intent to preclude tolling under § 6511. In contrast to the simple language of ordinary limitations periods, the tax statute set forth its limitations in "a highly detailed technical manner, that, linguistically speaking, cannot easily be read as containing implicit exceptions." *Id.* The statute also repeated the limitations period "several times in several different ways." *Id.* at 351. The statute set forth explicit exceptions to its time limits, and these exceptions did not include equitable tolling. *See id.*

Finally, the Court pointed to the underlying subject matter of tax collection in reinforcing its conclusion. It noted that the IRS processes over 200 million returns and issues 90 million refunds each year. *See id.* at 352. *See also United States v. Beggerly*, 524 U.S. 38, 48-49 (1998) (rejecting equitable tolling as inconsistent with the Quiet Title Act).

This court has previously struggled to reconcile *Irwin* and *Brockamp* in connection with other statutes. *See, e.g., Bailey v. West* 160 F.3d 1360, 1362-1368 (Fed. Cir. 1998) (en banc) (allowing equitable tolling of time limit for appealing Board of Veterans' Appeals decision to Court of Veterans Appeals); *RHI Holdings, Inc. v. United States*, 142 F.3d 1459, 1461-63 (Fed. Cir. 1998) (rejecting equitable tolling in tax refund case of limitations period specified in 26 U.S.C. § 6532(a)). Here, however, we need not decide the difficult questions concerning the scope of judge-made equitable tolling doctrines because the tolling here is mandated by statute.

On their face, neither Rule 23 of the Federal Rules of Civil Procedure nor the corresponding Rule 23 of the Court of International Trade (which is applicable here) tolls the statute of limitations. But Rule 3 of the Federal Rules of Civil Procedure and Rule 3 of the Court of International Trade do provide that an "action is commenced by filing a complaint." It has long been held that, at least for federal causes of action, the result of Rule 3 is that the filing of a complaint stops the running of the statute of limitations. *See Henderson v. United States*, 517 U.S. 654, 657, 657 n.2 (1996). However, in a non-class action, once a complaint is dismissed a plaintiff does not usually enjoy the benefits of tolling for the period during which the action was pending. For example, a suit voluntarily dismissed under Federal Rule of Civil Procedure 41 (a) is treated "as if it had never been filed," and the statute of limitations is therefore not tolled during the pendency of such a case. Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure* § 2367 (2d ed. 1995); *Beck v, Caterpillar, Inc.*, 50 F.3d 405, 407 (7th Cir. 1995). *But see*

Irwin, 498 U.S. at 96 (noting that equitable tolling has been allowed when a claimant has filed a defective pleading during the limitations period).

A somewhat different situation applies under Rule 23 for class actions. In *American Pipe & Construction Co. v. Utah*. 414 U.S. 538, 554 (1974), the Supreme Court held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." The rule of *American Pipe* appeared to apply only to purported members of the class who made timely motions to intervene after the trial court denied class certification. However, in *Crown, Cork & Seal Co. v. Parke* , 462 U.S. 345 (1983), the Supreme Court extended the tolling rule of American Pipe to all members of the asserted class. including those who subsequently filed their own suits. *Id*. at 353-54.

American Pipe and *Crown, Cork & Seal* were not based on judge-made equitable tolling, but rather on the Court's interpretation of Rule 23. In *American Pipe*, the Court explained that "[u]nder present Rule 23, the filing of a timely class action complaint commences the action for all members of the class as subsequently determined." *American Pipe*, 414 U.S. at 550. The Court then held that the class action suspended the statute of limitations for all asserted class members because the contrary approach "would frustrate the principal function of a class suit" by forcing putative class members to file suit to protect their rights. *Id.* at 551. Similarly, in *Crown, Cork & Seal Co*., 462 U.S. at 351, the Court recognized that unless the statute of limitations were tolled by the filing of a class action, "[t]he result would be a needless multiplicity of actions -- precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid."

This court has already held in *Wood-Ivey Sys. Corp. v. United States*, 4 F.3d 961 (Fed. Cir. 1993) that the Federal Rules of Civil Procedure govern tolling against the

government. Because "[a]ll laws in conflict with [the Federal Rules of Civil Procedure shall be of no further force or effect after such rules have taken effect," 28 U.S.C. § 2072(b), the Federal Rules of Civil Procedure, like the Federal Rules of Criminal procedure, are "as binding as any federal statute." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988).

To be sure, Rule 23 of the Court of International Trade, unlike Rule 23 of the Federal Rules of Civil Procedure, is not statutory. Congress authorized the Court of International Trade to establish its own procedural rules, *see* 28 U.S.C. § 2633(b), and unlike the Federal Rules of Civil Procedure, the Court of International Trade's rules are not required to be transmitted to Congress. *See* 28 U.S.C. § 2074(a). But here the statute of limitations itself incorporates the rules of the Court of International Trade: an action under 28 U.S.C. § 1581(i) "is barred unless commenced in accordance with the rules of the court within two years after the cause of action first accrues." 28 U.S.C. § 2636(1) (emphasis added). Thus, there is no basis for distinguishing the Court of International Trade's Rule 23 from Rule 23 of the Federal Rules of Civil Procedure for purposes of *American Pipe*. Having determined that Rule 23 tolling is statutory rather than equitable, it follows that the rule of *American Pipe* applies to the government just as it does to private parties, both generally and in this particular case.

V.

Our final question is whether the tolling here stopped with the dismissal of the class action by the district court in *Baxter* or whether it continues until the district court's decision is no longer subject to appeal. The Eleventh Circuit directly addressed this question in *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374 (llth Cir. 1998) (en banc), and it concluded that tolling ends with the district court's dismissal of the class action. We agree.

In reaching its conclusion that tolling ends when class certification is denied in the trial court, the *Armstrong* court both undertook a thorough review of the Supreme Court's cases regarding equitable tolling and also carefully examined the practical ramifications of its choice of rules. *See Annstrong*, 138 F.3d at 1380-91. We find its analysis persuasive. For example, in *Crown, Cork & Seal Co.*, the Supreme Court stated: "Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied. At that point, class members may choose to file their own suits or to intervene as plaintiff in the pending action." *Crown, Cork & Seal Co.*, 463 U.S. at 354. The suggestion that putative class members may choose to intervene as plaintiffs after denial implies that tolling ends with the district court's denial of class certification - if putative class members were to wait until all appeals were final, there would rarely be a "pending action" left into which putative class members might intervene.

Regarding the practical implications of resuming the running of the statute of limitations upon a district court's denial of class certification, the Eleventh Circuit recognized that its rule would lead to unnecessary litigation in the few cases in which a district court abuses its discretion in denying class certification and is reversed on appeal. In those cases, in order to protect their rights prior to reversal of the district court's denial of class certification, putative class members will be required to take duplicative and unnecessary action - intervening in the pending action or filing their own suits. Such cases, however, are very unusual. In contrast, the Eleventh Circuit found that continuing to toll the statute of limitations through the date on which the district court decision is no longer subject to review on appeal would "seriously contravene the policies underlying statutes of limitations." *Armstrong*, 138 F.3d at 1388. Limitations periods could be tolled for years. During these long delays, evidence could be lost, memories could fade, and witnesses could disappear. Defendants would have no way of knowing how many individual claims would exist if class certification

were denied. Often, plaintiffs will not seek review of a denial of class certification until after final judgment. Even if plaintiffs seek interlocutory appeal (as now allowed by Rule 23(f) of the Federal Rules of Civil Procedure but not the Court of International Trade rules), an appellate court has discretion to deny the appeal, thereby leaving the certification unresolved until final judgment. *See id.* at 1389. This case provides a perfect example of the lengthy delays that would be created if the limitations period were tolled until the appellate process was complete: it has been over four years since the district court in *Baxter* denied class certification, and that case remains ongoing.

Even prior to *Armstrong*, the rule that tolling ends with a trial court's denial of class certification was widely followed in other circuits. *See Nelson v. County Allegheny*, 60 F.3d 1010, 1013 (3d Cir, 1995); *Calderon v. Presidio Valley Farmers Ass'n*, 863 F.2d 384, 390 (5th Cir. 1989); *Andrews v. Orr*, 851 F.2d 146, 149-50 (6th Cir. 1988); *Fernandez v. Chardon*, 681 F.2d 42, 48 (lst Cir. 1982). Furthermore, we are aware of no contrary court of appeals decision since *Armstrong* was decided, and at oral argument Stone's counsel conceded that there are none.[6] *See, e.g., Hemenway v. Peabody Coal Co.*, 159 F.3d 255, 266 (7th Cir. 1998). In fact. *Jimenez v. Weinberger,* 523 F.2d 689 (7th Cir. 1975), is apparently the only appellate case with language in conflict with *Armstrong*. That court stated that '[i]f [the district

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[6] Conflicts among the circuits do exist in two other contexts, *See* Robert H. Klonoff and Edward K. Bilich *Class Actions and Other Multi-Party Litigation* 469 (2000). First, there is a conflict as to whether the rule of *American Pipe* applies to actions founded on state law. *Compare Hemenway v. Peabody Coal Co.*, 159 F.3d 255, 265 (7th Cir. 1998) with *Adams Public School District v. Asbestos Corp.*, 7 F.3d 717, 719 (8th Cir. 1993). Second, there is a conflict regarding whether the rule of *American Pipe* applies to opt-in class actions such as those under the ADA. *See Basch v. Ground Round Inc.*, 139 F.3d 6, 10-11 (ist Cir. 1998) (discussing circuit split). As we are confronted here with an opt-out class action arising under federal law, we need not address those questions here.

court] decision had expressly refused to certify the case as a class action, we think the tolling would have continued if the plaintiffs had appealed from such a ruling, if necessary but probably would not have continued if they had acquiesced." *Id.* at 696. This comment, however, was dictum: the *Jimenez* court concluded that the district court had reached a decision on the merits without ruling on the class certification issue. Thus, it held, class claims remained pending. *Jimenez*, 523 F.2d at 696-97. In light of the sound reasoning of the *Armstrong* court, we hold that tolling ends when class certification is denied in the trial court.

CONCLUSION

For the foregoing reasons, the decision of the Court of Intentional Trade is affirmed.

COSTS

No costs.

AFFIRMED

APPENDIX B

Slip Op. 98 – 143

UNITED STATES COURT OF INTERNATIONAL TRADE

STONE CONTAINER CORPORATION, STONE CONTAINER INTERNATIONAL, and STONE CONTAINER SAVANNAH RIVER PULP AND PAPER,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

Court No. 96-10-02366

[Plaintiff's motion for summary judgment granted in part.]
Dated: October 5, 1998

Katten Muchin & Zavis (Mark S. Zolno, Kirk T. Hartley, Michael E. Roll, David M. Dunbar and *James L. Sawyer)* for plaintiffs.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Jeanne E. Davidson, Todd M. Hughes* and *Lara Levinson*), and *Richard McManus* Office of the Chief Counsel, United States Customs Service, of counsel, for defendant.

OPINION

RESTANI, Judge: This matter is before the court on cross motions for summary judgment. The only issue in dispute is the applicable limitations period for the recovery of Harbor Maintenance Taxes (HMT) from defendant.

The Supreme Court has ruled that suit is to be brought here under 28 U.S.C. § 1581(i) (1994), *United States v. United States Shoe Corp.*, 118 S.Ct. 1290, 1294, n. 3 (1998). The applicable limitations period for suits brought under 28 U.S.C. § 2636(i) (1994). The statute provides:

> **§ 2636. Time for commencement of action**
>
> (i) A civil action of which the Court of International Trade has jurisdiction under section 1581 of this title, other than an action specified in subsection (a) - (h) of this section, is barred unless commenced in accordance with the rules of the court within two years after the cause of action first accrues.

The parties agree that the statute of limitation runs from the date of payment of the tax, but plaintiffs also argue that an attempted Rule 23 class action, *Baxter Healthcare Corp. v. United States*, 925 F. Supp. 794 (Ct. Int'l Trade 1996), tolled the running of the statute. The United States argues that 28 U.S.C. § 2636 provides no tolling mechanism and that any tolling provision in a statute of limitations applicable to the United States must be express.

Two Supreme Court cases make clear that the statutory language is the key. *See Irwin v. Dep't of Veteran Affairs*, 498 U.S. 89 (1990) (recognizing a rebuttable presumption of equitable tolling), *Brockamp v. United States*, 519 U.S. 347, 117 S.Ct. 849 (1997) (complicated statute of limitations for tax claims did not permit equitable tolling). *Accord JVC Corp. v. United States*, Slip Op. 98-97, No. 96-01-00192, 1998 WL 417415 (Ct. Int'l Trade July 7, 1998)

(administrative deadlines for challenging customs duties not subject to equitable tolling).[1]

Brockamp, relied on heavily by defendant, is particularly informative. In that case, because the statute of limitations was very complicated and contained alternatively calculated limitations periods, the court found no other "tolling" applicable. 519 U.S. at __, 117 S.Ct. 859, 851-52. Here the statute is very simple. There are no alternative time periods, administrative prerequisites or a list of tolling factors, such as incompetency, affirmative misconduct, etc., in 28 U.S.C. § 2636. The plaintiff has two years from claim accrual in which to commence suit in accordance with the rules of the court.

One of the rules of the court is Rule 23 which parallels Fed. R. Civ. P. 23.[2] Rule 23 stops the statute of limitations from running for all claims covered by the representative action. *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974) (tolling of statute of limitations by class action complaint under F.R. Civ. P. 23). *Baxter* clearly was intended to apply to all payments on foreign exports, the same claims involved here. The statutes at issue present no reason to disregard the Supreme Court's holding in *American Pipe* with respect to suits brought under 28 U.S.C. § 1581(i). In fact, the language of the applicable limitations statute, 28 U.S.C. § 2636(i), indicates that this type of "tolling" should be

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[1] Class certification in a second class action, *Mondial v. United States*, No. 94-11-00682, was denied at the same time certification was denied in *Baxter*. *See Baxter Healthcare Corp. v. United States*, 925 F. Supp. 794 (Ct. Int'l Trade 1996). Certification in a later filed action was also denied. *See U.S. Vinadium Corp. v. United States*, Slip Op. 98-124, No. 98-05-01726, 1998 WL 552682 (Ct. Int'l Trade Aug. 25, 1998). This belated attempt at certification does not restart tolling. *Korwek v. Hunt*, 827 F.2d 874, 879 (2d Cir. 1987).

[2] *See Tomoegawa (U.S.A.) Inc. v. United States*, 15 CIT 182, 185-86, 763 F. Supp. 614, 617 (1991) ("Since the Rules of the Court of International Trade mirror the Federal Rules of Civil Procedure, it is without question that this court may look to the decisions and commentary on the Federal Rules in the interpretation of its own rules.")

permitted.[3] That is, suit was "commenced," albeit through a representative action permitted by the rules of the court, within two years of claim accrual. 28 U.S.C. § 2636(i).

It also should be noted that the attempted class certification was not frivolous. The basic Rule 23 criteria were met in *Baxter* and *Mondial*. *See Baxter*, 925 F. Supp. at 797. The court in its discretion simply found that because of the particular case posture the class vehicle was not a superior mechanism for resolution of the disputes. *Id.* at 797-800. The *American Pipe* rule is a blanket tolling rule which avoids a myriad of suits in the event a class action is certified. The rationale of *American Pipe* is not based on any factor which would lead one to conclude that the suits brought against the United States under 28 U.S.C. § 1581(i) are exempt from its holding. Fed. R. Civ. P. 23 applies to suits against the United States. *See, e.g., Walters v. Reno*, 145 F.3d 1032 (9th Cir. 19.98) (aliens brought class action suit against Immigration and Naturalization Service challenging constitutionality of certain administrative procedures of Immigration and Naturalization Act of 1990); *Dunbar v. Glickman*, 90 F.3d 681 (2d Cir. 1996) (food stamp recipients brought class action against U.S. Department of Agriculture challenging changes to food stamp policy). Presumably Congress is aware that the CIT rules are parallel.[4]

The next issue is when the tolling stops if class certification is denied. There are two circuit opinions coming

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[3] It is not clear that "tolling" conveys the concept at issue here. As noted in *Crown Cork & Seal*, 462 U.S. 345, 354 (1983), filing of the class action gives the defendant sufficient notice of the magnitude as well as of the substance of the claim so that evidence, including testimony, may be preserved and surprise is avoided. Thus, the statute of limitations is met, not simply waived. *See also Wood-Ivey Systems Corp. v. United States*, 4 F.3d 961 (1993) (filing in accordance with Rules of Claims Court satisfies statute of limitations).

[4] Under 28 U.S.C. § 2071(a) (1994), the rules prescribed by this court must be consistent with the general rules of procedure prescribed by the U.S. Supreme Court for the U.S. district courts and courts of appeal.

to essentially opposite conclusions on this issue. In *Jimenez v. Weinberger*, 523 F.2d 689, 696-98 (7th Cir. 1975), a panel of the Seventh Circuit, which affirmed a decision to certify a class after a finding of unconstitutionality, concluded that the statute of limitations was tolled from the outset even though the court originally did not certify a class. In fact, because the case was disposed of adversely to plaintiffs on the merits, the certification issue was not discussed. Nonetheless tolling was found to be without interruption. While Jimenez is not entirely apposite, it is the strongest authority for plaintiffs on this sub-issue.

In *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374 (11th Cir. 1988), the Eleventh Circuit sitting *en banc* concluded that tolling does not continue after class certification is denied in the trial court.[5] It rejected the proposition that tolling should extend until the case is complete and appellate rights are exhausted. It did so even though Rule 23 currently does not permit interlocutory appeal of denial of certification as of right.[6]

The parties had the opportunity to request certification for interlocutory appeal of the class certification issue and to seek stay of the court's order. 28 U.S.C. § 1292 (d)(1) (1994) (appeal of CIT interlocutory order), USCIT Rule 62(d) (stay upon appeal). Simply because the parties did not have the *right* to immediately appeal, but have the right to appeal this issue at the conclusion of the case, is no reason to continue the tolling after class certification is denied. The purposes of Rule 23 are amply served by the original tolling. *See supra* note 3. After class certification is denied the defendant has the right to know what individual suits will be filed against it.

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[5] *Armstrong* cites a Third Circuit case *Fernandez v. Chardon*, 681 F.2d 42, 48 (1st Cir. 1982), *aff'd Chardon v. Soto*, 462 U.S. 650 (1983), which reaches the same conclusion in *dicta*.

[6] Rule 23, as recently amended, will allow such appeal without district court certification of the issue for appeal. Fed. R. Civ. P. 23(f) (Amendment Effective Dec. 1, 1998).

The court finds the reasoning of *Armstrong* persuasive and concludes that tolling ended when class certification was denied.

Plaintiffs have raised many other arguments, all leading to the proposition that sovereign immunity is no defense to this action, including that sovereign immunity was obviated by the First Amendment right to petition for redress of grievance, that HMT are held in trust and that the sovereign is not immune from claims based on unconstitutional statutes. The court assumes *arguendo* that sovereign immunity may not be imposed as a defense to this action. Even if 28 U.S.C. § 2636(i) is not viewed as part of a statutory scheme conditionally waiving sovereign immunity, it is not necessarily devoid of all meaning in this context.

Governmental entities may create statutes of limitation for any type of claim against any defendant in order to avoid stale claims and to increase certainty. In *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), the Supreme Court required Florida to provide a clear remedy for recovery of improperly exacted taxes, but it did not require an unlimited remedy. The same rule should apply to the federal government.

Whether or not it took some litigation to resolve the issue of exactly what avenue was available for recovery of HMT, it was clear from the outset that Congress provided a remedy in this court, 26 U.S.C. § 4462(f)(2) (1994). After *U.S. Shoe*, 118 S.Ct. at 1294, it is clear that the remedy is under 28 U.S.C. § 1581(i). Under 28 U.S.C. § 2636(i) suit must be brought within two years of payment of the tax. This is an easy enough period to compute, and plaintiffs have not attempted to establish that two years was too short a period in which to meaningfully pursue their claims.

Given that the HMT statute clearly provided for a remedy in this court, as *U.S. Shoe* recognized, 118 S.Ct. at 1294 n. 3, there is no Tucker Act jurisdiction in either the district courts or the Court of Federal Claims. *Id.* Nor will

the court adopt the Tucker Act statute of limitations when Congress has provided otherwise. Jurisdiction in this court is exclusive, 28 U.S.C. § 1581(i), and the two-year statute of limitations of 28 U.S.C. § 2636(i) does not deprive plaintiffs of a clear and equitable avenue of relief.

The parties have 20 days to present an order to the court for judgment against the United States for claims brought within the statute of limitations as tolled and for dismissal of the remaining claims.

Jane A. Restani
JUDGE

Dated:New York, New York
This 5th day of October, 1998.

(2)

Supreme Court, U.S.
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No. 00-1131

In The Supreme Court of the United States

SMURFIT-STONE CONTAINER CORPORATION, *Petitioner*,

v.

UNITED STATES, *Respondent*.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF AMICUS CURIAE NEW HOLLAND NORTH AMERICA, INC. IN SUPPORT OF PETITIONER

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28 pp

QUESTION PRESENTED

Whether the United States may constitutionally limit its refunds of taxes collected under an unconstitutional and void *ab initio* statute by the application of any statute of limitations?

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae New Holland North America, Inc. ("New Holland")[1] paid the Harbor Maintenance Tax ("HMT") on exports pursuant to 26 U.S.C. § 4461 and filed a claim in the U.S. Court of Federal Claims ("CFC") under the Tucker Act, 28 U.S.C. § 1491(a)(1). New Holland sought a refund of money paid under the HMT, alleging that the tax as applied to exports is unconstitutional as violative of the Export Clause of the United States Constitution. U.S. Const. art. I, § 9, cl.5. That case was transferred by the CFC to the U.S. Court of International Trade ("CIT"). New Holland's suit, along with all other HMT export refund cases, has been stayed pending resolution of this test case and related litigation.

In *United States v. United States Shoe Corporation*, this Court held that the HMT as it applied to exports was a violation of the Export Clause of the Constitution. 523 U.S. 360, 370 (1998). That decision, however, did not determine the appropriate remedy for the violation of the Export Clause. As a result, approximately 7,000 claimants, which have filed civil actions seeking to recover the unconstitutional HMT, have not received the full refunds to which they are entitled.

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, the party submitting this brief states that neither counsel for the United States nor counsel for the Smurfit-Stone Container Corporation in any way authored this brief, either in whole or in part, and no other person or entity other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of the brief. In addition, New Holland North America, Inc. has gained the consent of the United States Government and Smurfit-Stone Container Corporation to file an *amicus* brief in this case. Letters of consent are being filed with the Clerk.

Amicus and the other exporters whose cases have been stayed are similarly situated to Smurfit-Stone Container Corporation ("Petitioner"). The outcome of the present case will determine whether these exporters, including *Amicus*, are entitled to a full return of approximately $500,000,000 that was unconstitutionally collected from them. *See* Petition at 3.

STATEMENT

The question raised by the Petition - whether Tucker Act jurisdiction and its accompanying six-year statute of limitations should have been applied here - begs the predicate question of whether, given that the unconstitutional HMT on exports is void *ab initio*, any statute of limitations may constitutionally be applied to claims for refunds of the HMT on exports. That predicate question was addressed below by the Petitioner and by *Amicus*,[2] and was ruled on by the CIT and the U.S. Court of Appeals for the Federal Circuit ("CAFC").

Before the CIT, the "Petitioner argued . . . that Tucker Act Jurisdiction (28 U.S.C. § 1491 (a)(1)) existed under established Supreme Court precedent not addressed by this Court in *United States Shoe* and requested the CIT to transfer part of its case to the CFC. Petitioner also asserted it was entitled to refunds of all the unconstitutional taxes it had paid. Alternatively, if a

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[2] New Holland North America, Inc., Steelmet, Inc., *et al.*, The National Industrial Transportation League, and Addison Wesley Longman, *et al.* filed *Amicus* briefs in *Stone Container Corp. v. United States*, 229 F.3d 1345 (Fed. Cir. 2000); New Holland North America, Inc. filed an *Amicus* brief in *Stone Container Corp. v. U.S.*, 27 F. Supp.2d 195 (Ct. of Int' l Trade 1998).

statute of limitations applied to Petitioner's action, Petitioner maintained that Customs owed additional refunds due to the '*American Pipe*' tolling created by the filing of a class action in *Baxter Healthcare v. United States*." Petition at 6 (citations omitted) (emphasis in original). In response, the CIT held:

> Governmental entities may create statutes of limitation for any type of claim against any defendant in order to avoid stale claims and to increase certainty. In *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco,* the Supreme Court required Florida to provide a clear remedy for recovery of improperly exacted taxes, but it did not require an unlimited remedy. The same rule should apply to the federal government.

Stone Container Corp. v. United States, 27 F. Supp.2d 195, 198 (Ct. Int'l Trade 1998) (citation omitted).

On appeal to the CAFC, the Petitioner argued "it is unconstitutional to apply any statute of limitations to refund claims with respect to an unconstitutional tax." *Stone Container Corp. v. United States*, 229 F.3d 1345, 1349 (Fed. Cir. 2000). The court responded, on the basis of dictum in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), that enforcing a statute of limitations in suits to recover payment of unconstitutional taxes was not unconstitutional. *Stone Container Corp.*, 229 F.3d at 1349.

Although Petitioner has not requested review of these rulings, *see* Pet. at 7, n.4, *Amicus* respectfully submits - on behalf of itself and the thousands of others similarly situated - that, for the reasons advanced in the following sections, this Court should first reach and

resolve the issue of whether any statute of limitations may constitutionally be applied in the circumstances of this void *ab initio* statute before turning to the issue raised by the Petitioner concerning the applicability of the statute of limitations normally applied to claims involving unconstitutional takings. Accordingly, *Amicus* urges the Court both to accept the petition and to direct consideration of the question here presented in addition to the question directly presented by Petitioner.

REASONS FOR GRANTING THE WRIT

I. The HMT is Unconstitutional and Void *Ab Initio* and, Consequently, no Statute of Limitations Should Apply to Prevent Full Recovery by the Petitioner

A. This Issue is Squarely Presented for Review

Whether the government may employ a statute of limitations that restricts the refund of federal taxes collected under an unconstitutional statute that is void *ab initio* is a predicate question which ought to be fully considered by this Court before reaching the question presented by the Petitioner. The predicate question is squarely presented by this case: all parties and both lower courts addressed the potential unconstitutionality of the imposition of any statute of limitations on refunds of the HMT.

B. The HMT on Exports is Unconstitutional and Void *Ab Initio*

The HMT on exports was enacted and enforced in violation of the Constitution. The determination by this

Court that the HMT on exports is unconstitutional renders the HMT void *ab initio*. *See Chicago, I. & L. R. Co. v. Hackett*, 228 U.S. 559, 566 (1913) ("[A]n invalid exercise of the power of Congress . . . [is] as inoperative as if it had never been passed . . . ."); *Fairbank v. United States*, 181 U.S. 283, 286 (1901) ("The particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void . . . .") (citations omitted); *Ex Parte Siebold*, 100 U.S. 371, 376 (1879) ("An unconstitutional law is void, and is as no law.").

This Court's precedent directs that decisions on questions of constitutionality must be given retroactive effect. *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993) (recognizing a general rule of retrospective effect for the constitutionality decisions of the Supreme Court). Therefore, a decision by the Court that a tax is unconstitutional must be given retroactive effect, and the remedies available to the taxpayer may not be limited by a merely prospective application of that decision. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 534 (1991); *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 22 (1990); *Harper v. Virginia Dep't. of Taxation*, 509 U.S. 86, 100 (1993). In rejecting prospective relief as insufficient, these decisions confirm that when a law is declared unconstitutional, it is void *ab initio*, and, therefore, all actions taken pursuant to that law are similarly void and must be undone.

Due process mandates that the Government "undo" an unconstitutional tax by providing a refund. In *McKesson*, in response to the question of whether "prospective relief, by itself, exhausts the requirements of federal law," the Court determined that:

> [t]he answer is no: If a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a post payment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.

McKesson, 496 U.S. at 31 (footnote omitted). Therefore, the judicial determination that the HMT on exports is void *ab initio* is not sufficient as a matter of law; the Government must provide meaningful backward-looking relief. To ensure that the HMT on exports is indeed treated as void from its inception, the Government must provide the only meaningful backward-looking relief available - a full refund of all unlawfully-collected HMT.

C. Due Process Mandates a Full Recovery for the Plaintiffs in This Case

The Fifth and Fourteenth Amendments guarantee that no person shall be deprived of life, liberty, or property without due process of law. *See, e.g., DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 196 (1989) ("Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression . . . .'") (citations omitted). The collection of taxes implicates a property interest within the meaning of the Fifth and the Fourteenth Amendments. *See Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930).

Accordingly, a denial of a full recovery of taxes exacted by compulsion in direct violation of an express provision of the Constitution is itself a violation of the Constitution.[3] *See Reich v. Collins*, 513 U.S. 106, 109 (1994) ("'[A] denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment' . . . .") (citations omitted); *Ward v. Love County*, 253 U.S. 17, 24 (1920) ("To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law. Of course this would be in contravention of the Fourteenth Amendment.").

Due process therefore mandates a "'clear and certain' remedy for taxes collected in violation of federal law." *Reich*, 513 U.S. at 108. Where there is no provision for predeprivation relief from an unconstitutional tax, the post-deprivation remedy must satisfy the due process requirements of the Constitution. *See McKesson*, 496 U.S. at 38-39. Post-deprivation relief for an unlawful tax must consist of meaningful backward-looking relief. *See Harper*, 509 U.S. at 101. To satisfy the Due Process Clause, the post-deprivation remedy must not only provide petitioner with "an opportunity to contest the

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[3] The HMT is a tax exacted by compulsion. An exporter or shipper who fails to pay the HMT is subject to penalties in the form of financial sanctions. 19 C.F.R. § 24.24(h) (1995). *See McKesson*, 496 U.S. at 38 n.21 (" We have long held that, when a tax is paid in order to avoid financial sanctions or a seizure of real or personal property, the tax is paid under 'dure ss' in the sense that the State has not provided a fair and meaningful predeprivation procedure.").

validity of the tax," but it must also provide a "'clear and certain remedy' designed to render the opportunity meaningful by preventing any permanent unlawful deprivation of property." *McKesson*, 496 U.S. at 40, *citing Reich*, 513 U.S. at 108.

In particular, the application of a statute of limitations is subject to Constitutional restrictions. *See James B. Beam Distilling Co.*, 501 U.S. at 535 ("Subject to possible constitutional thresholds . . . the remedial inquiry is one governed by state law, at least where the case originates in state court.") (emphasis added) (citations omitted). Indeed, a statute of limitations may not be applied if that application violates the Constitution:

> But what if a pre-existing, separate, independent rule of state law . . . a rule containing certain procedural requirements for any refund suit - nonetheless barred the taxpayers' refund suit? . . . Depending upon whether or not this independent rule satisfied other provisions of the Constitution, it could independently bar the taxpayers' refund claim.

Reynoldsville, 514 U.S. at 756 (emphasis added) (citations omitted).

In this case, where the constitutional violation is not merely a question of unequal or discriminatory enforcement of a tax in practice, but the attempted usurpation by Congress of a power (to tax exports) directly forbidden it by the explicit text of the Constitution, the application of any statute of limitations to bar a full recovery of all HMT unlawfully collected would violate the Due Process Clause. To allow the

federal Government to keep the unconstitutionally imposed HMT by application of a statute of limitations would thus permit the Government to violate the Constitution a second time, by keeping funds which it has no constitutional power to hold. Such application would not provide an adequate and fair remedy to the unconstitutional exaction of the HMT. To the contrary, it would entail the "permanent unlawful deprivation of property." *McKesson*, 496 U.S. at 40.

Therefore, the Government should not be permitted to impose and collect the unconstitutional HMT and then rely on a statute of limitations to bar a full refund of the HMT.

D. There is No Precedent to Support the Application of the Two-Year Statute of Limitations to Deny Recovery of Federal Taxes Exacted by Compulsion in Violation of the Constitution

The CAFC relied on three cases in support of its holding that the two-year statute of limitations in 28 U.S.C. § 2636(i) applied to the unconstitutional HMT and barred recovery of HMT on exports paid more than two years prior to the date the original action was filed in the CIT: *Block v. North Dakota*, 461 U.S. 273 (1983), *United States v. Dalm*, 494 U.S. 596 (1990), and *Boling v. United* States, 220 F.3d 1365 (Fed. Cir. 2000). The CAFC cited these three decisions for the proposition that, when a statute is deemed unconstitutional and, as a result, a remedy is due, an applicable statute of limitations may dictate the time by which a suit for relief must be brought. The decisions in *Block*, *Dalm*, and *Boling*, however, do not in fact answer the question of what is constitutionally required in order to remedy the effect of

an unconstitutional law; thus, they are irrelevant to the matter now before the Court. *See U.S. Shoe Corp. v. United States*, 907 F. Supp. 408, 426 (Ct. Int'l Trade 1995) (Musgrave, J., concurring). More particularly, those decisions make no attempt to address the question of the constitutionally-required remedy for a law passed by Congress in knowing disregard of an express textual Constitutional prohibition.

1. Block v. North Dakota

In *Block v. North Dakota*, the Court held that the Quiet Title Act was the exclusive means by which an individual could challenge the title of the United States to real property. *Block v. North Dakota*, 461 U.S. at 277. Further, the Court held that the statute of limitations provided by the Quiet Title Act was not unconstitutional because it merely limited the time during which a suit could be brought and did not actually deprive anyone of his or her property rights. *Id.* at 291. The CAFC relied on *Block* for the proposition that imposing a statute of limitations on Smurfit-Stone Container did not amount to a deprivation of property without due process. *Stone Container Corp.*, 229 F.3d at 1350.

The CAFC's analysis, however, goes beyond what *Block* actually held. In *Block*, the Court did not reach the question of whether the Government may retain revenue exacted pursuant to an *unconstitutional* statute that is void *ab initio*. The Court did not find the underlying law (the Quiet Title Act) unconstitutional and, thus, the Court's decision does not address the implications of the application of a statute of limitations to recovery of amounts paid pursuant to the mandate of an unconstitutional statute. Instead, the Court discussed the assertion of constitutional rights in relation to a constitutional statute, and whether such rights are

subject to procedural limitations, the constitutionality of which was not discussed.

It is not surprising that the Court applied the statute of limitations in *Block*. It logically follows that a statute of limitations would continue to apply to a constitutional law. It does not, however, necessarily follow from the decision in *Block* that, if a law is held to be unconstitutional and is, therefore, ignored by the Court, that a statute of limitations would apply, or would apply in the same way, as if the law were constitutional.

2. United States v. Dalm

As with *Block*, the lower court misapplied the holding in *United States v. Dalm*. 494 U.S. 596 (1990). In *Dalm*, the respondent received a sum of money from an estate that she administered; both income and gift taxes were assessed on the money, and she petitioned the Tax Court for a redetermination of the income tax. She made no claim, however, for a credit or recoupment of the gift tax that was paid. *Id.* at 599. The respondent later filed a claim to recover the gift tax on the theory of equitable recovery, but she did so beyond the applicable statute of limitations. *Id.* at 599-600. The Court held that the statute of limitations applied to bar the recovery of the gift tax because the respondent had previously chosen to litigate the claim under a different theory, with no mention of the gift tax, and had simply failed to achieve a desirable outcome. *Id.* at 611.

Thus, in *Dalm*, no statute was deemed unconstitutional. Although the Court in *Dalm* applied a statute of limitations to the claim, it did so only after the respondent had been given a full and fair opportunity to litigate and recover on all of her claims in the first instance. In neither *Dalm* nor *Block* were the parties

permanently deprived of any property by the government pursuant to an unconstitutional statute that was void *ab initio*.

3. Boling v. United States

The CAFC also cited one of its own decisions, which was not the subject of a petition filed in this Court, for the proposition that "the federal government may apply statutes of limitations to just compensation claims." *Stone Container Corp.*, 229 F.3d at 1350.

In *Boling*, the plaintiff brought a takings claim for land that was eroded after an artificial waterway was constructed by the government. The court held that the claim was barred by the six-year statute of limitations of the Tucker Act, which, it noted, applies to instances when the government fails to provide just compensation for the taking of private property. *Boling v. United States*, 220 F.3d at 1370. The court held that the claim was beyond the statute of limitations because the accrual date for the taking was the moment that erosion damage occurred, which they set at the time the waterway began to function. *Id.* at 1369. The damage had begun more than six years prior to the initiation of the claim and, thus, the claim was barred by the statute of limitations.

Boling is almost entirely devoted to the issue of accrual and equitable tolling, and only minimally discusses the principle for which it is cited in *Stone Container*. While the court holds that the statute of limitations applies to bar a claim in *Boling* for an unconstitutional taking, there again was no underlying

statute that was held unconstitutional.[4]

E. The Lower Court Misinterpreted and Misapplied *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*

McKesson stands for the proposition that, under the Fourteenth Amendment, the government is obligated to provide "meaningful" retroactive compensation for a tax that is deemed unconstitutional.[5] The holding in *McKesson* - that due process obligates a government to provide meaningful backward-looking relief to rectify any unconstitutional deprivation - governs the instant action. The CAFC, however, looked not to the principle elucidated in *McKesson*, but to *dictum* indicating that the

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[4] *Boling* supports the position taken by Petitioner in this case because, in *Boling*, the CAFC recognizes that the Tucker Act statute of limitations applies in takings cases. At a minimum, this Court should hold that the Tucker Act statute of limitations applies to the takings that occurred under the HMT, if any statute of limitations applies at all.

[5] This Court summarized the case as follows:

> The question before us is whether prospective relief, by itself, exhausts the requirements of federal law. The answer is no: If a state places a taxpayer under duress promptly to pay a tax when due and relegates him to a post-payment refund action in which he can challenge the tax' s legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.

McKesson, 496 U.S. at 31.

state might "enforce relatively short statutes of limitations applicable to such actions." *McKesson*, 496 U.S. at 45. That *dictum* in *McKesson*, however, is not relevant to the instant case because it was based on principles of federalism and comity and the traditional federal deference to state tax administration.[6] In the instant action, there are no state interests present, and there is no corollary requirement for comity or federal deference to state interests. Thus, the *dictum* in *McKesson* is completely inapplicable to the "case, matter, and circumstances involved" in the instant action. *McKesson*, 496 U.S. at 45; *see also Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 754-55 (1995) ("[The] remedy . . . depend[s] - like almost all legal issues - upon the kind of case, matter, and circumstances involved. Not all cases concerning retroactivity and remedies are of the same sort.").

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[6] In *National Private Truck Council v. Oklahoma Tax Comm' n*, this Court held:

> We have long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration.
>
> . . . .
>
> The reluctance to interfere with state tax collection continued in [*McKesson*], in which we confirmed that the States are afforded great flexibility in satisfying the requirements of due process in the field of taxation.

515 U.S. 582, 586-587 (1995) (emphasis added); *see also Harvard Law Review Association, The Supreme Court, 1989 Term: Leading Cases*, 104 Harv. L. Rev. 188, 194 (1990) (" [*McKesson*] may represent the greatest deference to state interests permissible in a regime that requires the vindication of federal rights.").

The *dictum* in *McKesson* should be further distinguished because *McKesson* addressed the unconstitutional enforcement of an otherwise constitutional tax. In contrast, the remedy in the instant action must address the unconstitutionality of a statute or provision that is void *ab initio*. The inapplicability of this *dictum* to situations of *ab initio* unconstitutionality is discussed in *McKesson*:

> Had the Florida courts declared the Liquor Tax invalid either because (other than its discriminatory nature) it was beyond the State's power to impose . . . because the taxpayers were absolutely immune from the tax . . . no corrective action by the State could cure the invalidity of the tax during the contested tax period. The State would have had no choice but to "undo" the unlawful deprivation by refunding the tax previously paid under duress, because allowing the State to "collect these unlawful taxes by coercive means and not incur any obligation to pay them back . . . would be in contravention of the Fourteenth Amendment."

McKesson, 496 U.S. at 39 (emphasis added), *citing Ward v. Love County*, 253 U.S. 17, 24 (1920), and *Carpenter v. Shaw*, 280 U.S. 363, 369 (1930). To demonstrate and support this proposition, the Court cited several examples in which it denied the constitutionality of the taxes imposed under a statute. In each case, the Court required the state to refund all of the unconstitutional taxes collected. *See Atchison, T & S.F.R. Co. v. O'Connor*, 230 U.S. 280 (1912) (*cited in McKesson*, 496 U.S. at 32); *Ward*, 253 U.S. at 24 (*cited* in *McKesson*, 496 U.S. at 33, 39); *Montana National Bank of Billings v. Yellowstone County*, 276 U.S. 499 (1928) (*cited in McKesson*, 496 U.S. at 34-35).

II. No Statute of Limitations Should Prevent the Recovery of Property Taken by the Government Under a Law that Congress Enacted with Knowledge that it Was In Violation of the Constitution

The unique circumstances of this case warrant a unique ruling: that no statute of limitations should bar the claims of exporters to recover the unconstitutionally collected HMT. First, when Congress enacted the HMT and applied it to exports, it knowingly violated the express prohibition of the Export Clause of the Constitution and arrogated to itself a power which the Constitution explicitly denies it.[7] Second, although Congress

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[7] The report of the House Committee on Merchant Marine and Fisheries stated that " Article 1, section 9, clause 5 of the Constitution provides 'no tax or duty shall be laid on articles exported from any State.' This is the only limitation on the otherwise plenary taxing authority of the Congress under Article 1, section 8, clause 1 of the Constitution. The Supreme Court has historically and consistently ruled against legislative attempts to directly or indirectly impose such levies. Whether characterized as a tax or a fee, to the extent that such a levy is construed as primarily for the purpose of revenue raising, it is tantamount to a tax on export and in part unconstitutional. [Footnote omitted]." In the section titled " Additional Views," the report stated, " . . . I continue to hold grave reservations concerning the constitutionality and policy implications of an *ad valorem* fee. First, in my judgment there is no intrinsic relationship between the imposition of a fee on cargo for port dredging services based exclusively on cargo value and the value of services provided. A tax by under any other name remains a tax. The research performed, by and at the Committee' s request, only strengthens my convictions in this regard." H.R. Rep. No. 251(IV), 99th Cong., 1st Sess. 23, 41 (1985) (A102) (A103) (statement of Representative Biaggi in Additional History).

designated the application of the HMT to exports as a "tax, " Congress designed the law in such a way that the CIT was found by this Court to have exclusive jurisdiction over claims involving the HMT, thus, rendering a two-year statute of limitations apparently applicable to all such claims. *See* 26 U.S.C. § 4461 (c)(1); 28 U.S.C. § 2636(i); *see also* S.Rep. No. 228, 99th Cong., 1st Sess. 10 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6705, 6714-15. This course of action resulted in a blatant unconstitutional taking of property, and did not even allow the normal six years to bring an action that otherwise is allowed for unconstitutional takings. 28 U.S.C. § 2501.

Those who were harmed by the taking that resulted from the imposition of the HMT on exports should be permitted to recover in full - without the application of any statute of limitations - that which was taken, as a remedy for the calculated violation of the Constitution by Congress in enacting and implementing the law. Any lesser remedy fails to correct the constitutional violation, where the Government has exacted and continues to hold revenues it had no power to take or to keep.[8]

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[8] In his concurring opinion in *United States Shoe Corp. v. United States*, Judge Musgrave of the CIT urged that court to observe a hard and fast rule against this type of Congressional action:

> While valid claims based upon unconstitutional acts by the federal government may at some time become stale or deemed waived, an attempt, as here, at interposing a very short statute of limitations runs afoul of due process and flaunts the sovereign' s role as, among other things, protector of rights of its citizens, from whom this government, almost uniquely when it was created, acquired all of its powers. And here, the

(continued to next page)

Moreover, the Court's adoption of a rule that prevents the application of a statute of limitations in this case would not release the floodgates on untimely takings suits. Rather, the ruling can and should be limited in scope to the unique circumstances of this case, where the taking occurred despite an explicit, textual limitation in the Constitution on the power of Congress, as well as Congress' knowledge of its violation of the Constitution. Under the specific facts and circumstances presented in this case, there can be no valid application of a statute of limitations, in that the Government never had, and does not now have, any power to take or to hold the property in question. By denying the application of a statute of limitations in this particular case, the Court will send a clear message to Congress that the federal Government may not "profit" in any way when it ignores the express provisions of the Constitution on the limitations of its power.

III. If Any Statute of Limitations Applies in *Stone Container*, it is the Tucker Act

In this particular case, once the HMT, as it applied to exports, was ruled unconstitutional and became void *ab initio*, the "tax" on exports ceased to be a valid tax, retroactive to the moment of its creation. As a result, all

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> legislative history reflects that the drafters of the Act were abundantly aware of the constitutional infirmity of the Act; this being true, enforcing the foreshortened statute of limitations is to reward the perpetration of an overtly unconstitutional act.

United States Shoe Corp., 907 F. Supp. at 424 (Musgrave, J., concurring).

monies exacted under the HMT on exports became at best a governmental taking of private property for public use. *See Reynoldsville*, 514 U.S. at 760 (1995) (Scalia, J., concurring) ("[I]f a plaintiff seeks the return of money taken by the government in reliance on an unconstitutional tax law, the court ignores the tax law, finds the taking of the property therefore wrongful, and provides a remedy."). As such, regardless of whether the CIT or the CFC has jurisdiction over a suit to reclaim the property taken, if any statute of limitations is to apply, it should be the six-year statute of limitations normally applicable to claims of unconstitutional takings, rather than a less specific statute of limitations that is tied only to the residual jurisdiction of a particular court.[9] Accordingly, as urged by Petitioner, if any statute of limitations may constitutionally be applied here, it is the six-year statute which applies to takings claims, and not a more limited statute designed to apply to "taxes" on imports, no matter which court has jurisdiction over the suit.

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[9] The HMT was properly analyzed as an attempted " tax", for all the reasons stated by the Court in *United States v. United States Shoe*, but it does not remain a tax after that holding; rather it " is as no law." *Reynoldsville Casket Co. v. Hyde*, 514 U.S. at 760 (Scalia, J., concurring), *citing Ex Parte Seibold*, 100 U.S. at 376.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* respectfully requests the Court to grant the petition, and also to order consideration of the predicate question presented by *Amicus* here.

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No. 00-1131

In the Supreme Court of the United States

SMURFIT-STONE CONTAINER CORPORATION,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of International Trade possesses exclusive jurisdiction over challenges to the constitutionality of the Harbor Maintenance Tax as applied to exported goods.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1–A19) is reported at 229 F.3d 1345. The opinion of the Court of International Trade (Pet. App. B1-B7) is reported at 27 F. Supp. 2d 195.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 2000. The petition for a writ of certiorari was filed on January 10, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Water Resources Development Act, Pub. L. No. 99-662, 100 Stat. 4082, was enacted in 1986 to pro-

vide comprehensive improvements in the Nation's ports and harbors. To fund such improvements, Title XIV of the Act (100 Stat. 4156) established the Harbor Maintenance Revenue Act of 1986, 26 U.S.C. 4461 *et seq.*, which imposes an ad valorem tax on the use of ports by importers, exporters, domestic shippers, and passenger liners. The Harbor Maintenance Tax is imposed on "any port use" by an "importer," "exporter," or "shipper" on the basis of the value of the "commercial cargo" shipped through the port. 26 U.S.C. 4461(a)-(c). "Commercial cargo" is defined as "any cargo transported on a commercial vessel, including passengers transported for compensation or hire." 26 U.S.C. 4462(a)(3)(A). Revenue from the tax is placed in the Harbor Maintenance Trust Fund, from which amounts are withdrawn to pay for improvements in ports and harbors. 26 U.S.C. 9505.

In *United States* v. *United States Shoe Corporation*, 523 U.S. 360, 363, 370 (1998), this Court held that, because the Harbor Maintenance Tax does not qualify as a "user fee," it may not constitutionally be applied to exported goods under the Export Clause of the Constitution. The Court further concluded that the Court of International Trade properly exercised jurisdiction in that case to entertain challenges to application of the Harbor Maintenance Tax to exports under 28 U.S.C. 1581(i). 523 U.S. at 365-366. Congress has specified that all claims that come within the jurisdiction afforded by that statute are "barred unless commenced * * * within two years after the cause of action first accrues." 28 U.S.C. 2636(i).

2. In this case, petitioner seeks to recover payments of the Harbor Maintenance Tax for exported goods that were made more than two years before this action was commenced in the Court of International Trade.

Although these claims are barred by the plain language of 28 U.S.C. 2636(i), petitioner asserted that this two-year statute of limitations is unconstitutional as applied to actions seeking a refund of the unconstitutional harbor tax on exports. Pet. App. A6. Alternatively, petitioner contended that the portions of its claim barred by the two-year statute of limitations in the Court of International Trade should be transferred to the Court of Federal Claims which, petitioner asserted, would have jurisdiction over its claims under the Tucker Act, 28 U.S.C. 1491(a)(1). Pet. App. A11 n.5, B6-B7.

The Court of International Trade rejected petitioner's argument that the two-year statute of limitations in 28 U.S.C. 2636(i) is unconstitutional. Pet. App. B6. Based upon the holding of this Court in *United States Shoe* that exclusive jurisdiction over claims for the recovery of unconstitutional Harbor Maintenance Tax exactions exists in the Court of International Trade (523 U.S. at 365-366 & n.3), the court also declined to transfer petitioner's untimely claims to the Court of Federal Claims. Pet. App. B6-B7.

3. The court of appeals affirmed. Pet. App. A1-A19.[1] The court noted that this Court has long held that statutes of limitations properly apply to constitutional claims and that a "constitutional claim can become time barred just as any other claim can." Pet. App. A8 (quoting *Block* v. *North Dakota*, 461 U.S. 273, 292 (1983), and citing, *e.g.*, *McKesson Corp.* v. *Division of*

[1] In the court of appeals, the United States challenged the decision of the Court of International Trade that the two-year statute of limitations was tolled during the pendency of two motions for class certification. Pet. App. A12-A16. The Federal Circuit affirmed the lower court's ruling on that issue, and we do not seek review of that holding.

Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990); *United States* v. *Dalm*, 494 U.S. 596 (1990)). The court of appeals noted that the remedy provided by Congress, and upheld by this Court in *United States Shoe*, plainly comports with due process requirements. Pet. App. A8-A10. Finally, the court rejected petitioner's argument that its untimely claims should be transferred to the Court of Federal Claims. *Id.* at A11 n.5. The court rejected petitioner's "suggestion that we disregard as dicta the Supreme Court's statements in *United States Shoe* that 'the Court of International Trade has exclusive jurisdiction over challenges to the [Harbor Maintenance Tax] under § 1581(i)(4)' and that 'the Court of Federal Claims lacks jurisdiction over the challenges to the [Harbor Maintenance Tax] currently pending there.'" Pet. App. A11 n.5 (quoting *United States Shoe*, 523 U.S. at 366 n.3).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The Federal Circuit properly concluded that the Court of International Trade possesses exclusive jurisdiction to entertain challenges to assessments of the Harbor Maintenance Tax on exported goods. Pet. App. A11 n.5. The court of appeals correctly followed the clear holding of this Court in *United States Shoe* that the Court of International Trade "has exclusive jurisdiction" over "controversies regarding the administration and enforcement of the HMT" pursuant to 28 U.S.C. 1581(i)(4). 523 U.S. at 366 & n.3. And, in refusing petitioner's request for a transfer of this case to the Court of Federal Claims, the court of appeals also

correctly followed the clear holding of *United States Shoe* that, "[b]ecause * * * the CIT has exclusive jurisdiction over challenges to the [Harbor Maintenance Tax] under § 1581(i)(4), it follows that *the Court of Federal Claims lacks jurisdiction* over the challenges to the [Harbor Maintenance Tax] currently pending there." 523 U.S. at 366 n.3 (citing 28 U.S.C. 1491(b)) (emphasis added).

Contrary to petitioner's assertion, this jurisdictional holding of the Court in *United States Shoe* is not dicta. Pet. App. A12-A13. In ascertaining, "[a]s an initial matter," its own jurisdiction over that case by first investigating whether "the CIT properly entertained jurisdiction," this Court was exercising an ordinary appellate responsibility. *United States Shoe*, 523 U.S. at 365. Although the respective jurisdictions of the Court of International Trade and the Court of Federal Claims had not been contested or addressed by the parties in *United States Shoe*, this issue was unquestionably a component of this Court's jurisdictional analysis of the case before it. See *id.* at 366 n.3. And, in reaching its jurisdictional conclusion in *United States Shoe*, the Court explicitly held that, because the Court of International Trade has "exclusive jurisdiction" over such cases, there is a "want of jurisdiction" over such cases in the Court of Federal Claims. *Ibid.* Having determined that jurisdiction over such claims is lacking in the Court of Federal Claims, this Court concluded that the parties that had erroneously brought their claims in that court were to be permitted to transfer their claims to the Court of International Trade under 28 U.S.C. 1631 "to cure want of jurisdiction" in the former court. 523 U.S. at 366 n.3.

Petitioner thus plainly errs in contending (Pet. 8-9) that the Court of International Trade and the Court of

Federal Claims may both exercise jurisdiction to entertain challenges to the Harbor Maintenance Tax. As this Court noted in *United States Shoe*, the Court of International Trade and the Court of Federal Claims do not have concurrent jurisdiction of such claims. 523 U.S. at 366 n.3. Instead, Congress expressly provided that the Court of Federal Claims has no jurisdiction to consider matters that come within the exclusive jurisdiction of the Court of International Trade. 28 U.S.C. 1491(c); *Humane Society of the United States* v. *Clinton*, 236 F.3d 1320, 1327 (Fed. Cir. 2001); see also *K Mart Corp.* v. *Cartier, Inc.*, 485 U.S. 176, 182-183 (1988).[2]

Petitioner also errs in relying (Pet. 8) on *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), and *Preseault* v. *ICC*, 494 U.S. 1 (1990), for the assertion that the Tucker Act provides jurisdiction to the Court of Federal Claims over challenges to the Harbor Maintenance Tax. Those cases stand for the uncontroversial proposition that Tucker Act jurisdiction exists unless Congress has withdrawn it. *Regional Rail Reorganization Act Cases*, 419 U.S. at 126; *Preseault* v. *ICC*, 494 U.S. at 12. As this Court pointed out in *United States Shoe*, however, Congress *has* specifically withdrawn Tucker Act jurisdiction for all actions that fall "within the exclusive jurisdiction of the Court of International Trade." 28 U.S.C. 1491(c) (Supp. IV 1998). See 523 U.S. at 366 n.3. It is precisely "[b]ecause * * * the CIT has exclusive jurisdiction

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[2] In establishing the jurisdiction of the Court of Federal Claims, Congress specified that "[n]othing herein shall be construed to give the United States Court of Federal Claims jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade * * * ." 28 U.S.C. 1491(c) (Supp. IV 1998).

over challenges to the [Harbor Maintenance Tax]" that this Court held that "it follows that the Court of Federal Claims lacks jurisdiction" over such cases. 523 U.S. at 366 n.3 (citing 28 U.S.C. 1491(b)).

2. Petitioner incorrectly relies (Pet. 11) on the prior decision of the court of appeals in *Cyprus Amax Coal Co.* v. *United States*, 205 F.3d 1369 (Fed. Cir. 2000), petition for cert. pending, No. 00-360, as support for an assertion that the Court of Federal Claims has concurrent jurisdiction over claims brought to challenge the constitutionality of the Harbor Maintenance Tax under the Export Clause. That assertion ignores the fact that it was precisely claims based upon the Export Clause that this Court had before it in *United States Shoe*, and it was those very claims that this Court held were within the "exclusive jurisdiction" of the Court of International Trade. 523 U.S. at 365-366 & n.3.

The issues addressed by the court of appeals in *Cyprus Amax* and the present case are, in any event, markedly different. The question addressed in *Cyprus Amax* was whether a claim for recovery of an unconstitutional federal excise tax that was not imposed under the Harbor Maintenance Tax—a claim for which jurisdiction unquestionably existed under the Tucker Act in the Court of Federal Claims—is subject to the statutory requirements that apply generally to all suits for the recovery of internal revenue taxes under 26 U.S.C. 6511, 6532 and 7422. 205 F.3d at 1372. In addressing that issue, the court of appeals had no occasion to consider—and plainly did not purport to address or reject—the clear direction of Congress (and the clear holding of this Court in *United States Shoe*) that the Court of Federal Claims has no jurisdiction over matters that fall "within the exclusive jurisdiction of

the Court of International Trade." 28 U.S.C. 1491(c) (Supp. IV 1998).

3. Amicus New Holland North America, Inc., errs in asserting (Am. Br. 2) that a statute of limitations may not constitutionally be applied to actions that challenge the constitutionality of the Harbor Maintenance Tax. Since petitioner has not raised this contention in the petition, it is "not properly before the Court." *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 37 n.35 (1954). Moreover, this Court has long made clear that federal statutes of limitations properly apply to constitutional challenges. As this Court held in *Block* v. *North Dakota*, 461 U.S. 273, 292 (1983), a "constitutional claim can become time-barred just as any other claim can." See also *United States* v. *Dalm*, 494 U.S. 596, 602 (1990). Indeed, in *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), this Court explicitly stated that legislatures may adopt and "enforce relatively short statutes of limitations applicable to such actions." *Id.* at 45. The court of appeals thus properly upheld the two-year statute of limitations on actions challenging the Harbor Maintenance Tax that Congress provided in 28 U.S.C. 2636(i). Pet. App. A6-A8.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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